Office Supreme Court, U. S.
FILED
OCT 2 1927
CHARLES ELMORE CROPLEY
CLERK

UNITED STATES OF AMERICA

The Supreme Court

No. 154 October Term, 1927.

JOHN W. BLODGETT, Plaintiff-in-Error,
vs.
CHARLES HOLDEN, as U. S. Collector of Internal Revenue for the Fourth Collection District of Michigan, Defendant-in-Error.

On Certificate from the United States Circuit Court of Appeals for the Sixth Circuit.

MOTION WITH NOTICE FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF.

DANIEL J. KENEFICK,
LYMAN M. BASS.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

INDEX.

	Page
tion for Leave to File Brief as *Amici Curiae*	1
Tax, Applied Retroactively to Past Transactions, Violates the Fifth Amendment	5
ition	8

CASES CITED.

vab v. Doyle, 258 U. S., 529	5
y v. Wardell, 258 U. S., 542	4
hols v. Coolidge, Adv. Op. 6/15/27, 797	5

UNITED STATES OF AMERICA.

The Supreme Court

October Term, A. D. 1927.

JOHN W. BLODGETT, Plaintiff-in-Error,

vs.

CHARLES HOLDEN, U. S. Collector of Internal Revenue for the Fourth Collection District of Michigan, Defendant-in-Error.

Come now, DANIEL J. KENEFICK and LYMAN M. BASS, and move this Honorable Court for leave to file the annexed brief herein as *amici curiae*.

DANIEL J. KENEFICK,
LYMAN M. BASS,
Office & P. O. Address,
Marine Trust Building,
237 Main Street,
Buffalo, New York.

UNITED STATES OF AMERICA
THE SUPREME COURT.

No. 154 October Term, 1927.

JOHN W. BLODGETT, Plaintiff in Error,

vs.

CHARLES HOLDEN, U. S. Collector of Internal Revenue for the Fourth Collection District of Michigan, Defendant in Error.

The facts in the instant case are, in all essential respects, similar to the facts in the case of Helen S. Schmidt v. United States of America now pending in the Court of Claims, wherein the claimant is represented by the firm of Kenefick, Cooke, Mitchell & Bass, attorneys, of which the undersigned are members. The facts in that case are fully and clearly stated in the petition which was filed in the Court of Claims on April 25th, 1927, a true and correct copy of which is hereto annexed and made a part hereof.

This petition discloses that Helen S. Schmidt, on the 17th day of May, 1924, transferred to each of her four children, Hans Schmidt, Jr., Walter S. Schmidt, Mary Louise Schmidt and Elsie Schmidt Klopp, in consideration of natural love and affection, seven thousand (7,000) shares of the common stock of The Niagara Falls Power Company. On the date of the gift, the market value of the shares of stock so transferred, to wit, twenty-eight thousand (28,000) shares was One million, three hundred and nine thousand dollars ($1,309,000.00).

The Revenue Act of 1924, which imposed the Gift Tax, was enacted June 2, 1924. Pursuant to its provisions, Helen S. Schmidt filed with the Collector of Internal Revenue, at Buffalo, N. Y., her return for the calendar year of 1924, in which she reported the gifts above described and duly paid, under protest, to the said Collector, the amount of the gift tax assessed, to wit, One hundred fourteen thousand, eight hundred and fifty dollars ($114,850.00), together with accrued interest amounting in all to one hundred sixteen thousand twenty-five dollars and thirty cents ($116,025.30).

Thereafter the said Helen S. Schmidt, duly filed with the said Collector at Buffalo, N. Y., a claim for refund for the amount of the tax so paid, which claim was rejected for the full amount thereof. Subsequently the rates prescribed in Section 319 of the Revenue Act of 1924 were modified and reduced by the provisions of Section 324 of the Revenue Act of 1926, which was made applicable to returns for Gift Taxes for the calendar years of 1924 and 1925, and in accordance therewith, the said Helen S. Schmidt received a refund of Thirty-seven thousand, eight hundred seventy-six dollars and Twenty-seven cents ($37,876.27) of the amount of the tax so paid by her leaving a balance of Seventy-eight thousand, one hundred forty-nine dollars and Three cents ($78,149.03), with interest, the recovery of which is sought in the action instituted by her against the United States in the Court of Claims.

The only distinguishing feature between the two cases is that the gift in the case at bar consisted of bonds and obligations of one state and of political subdivisions of other states, while the gift in the case of Helen S. Schmidt v. United States of America, consisted of stock of a private corporation. The case at issue therefore, presents all of

the questions which might possibly be raised on appeal in the case of Helen S. Schmidt v. United States of America and includes also the question as to whether or not the tax violates the unwritten prohibition of the Constitution that bonds of the various states and political subdivisions thereof are not subject to tax by Congress.

All of the questions of law involved in this appeal are very fully and carefully covered in the brief of the plaintiff in-error and other briefs filed herein. We therefore deem it unnecessary again to review at length the cases and authorities which are pertinent and applicable to the questions herein presented for determination by this court. We do, however, wish to refer to two recent cases decided by this court which we submit clearly establish the invalidity and unconstitutionality of this particular tax, especially when it is applied as in this case to transfers completed before the effective date of the Act.

In the case of *Levy v. Wardell*, 258 U. S., 542, the questions at issue were the proper construction and the validity of the provisions of the Federal Estate Law of September 8th, 1916. Pursuant to its provisions, the Government sought to sustain a tax based in part upon certain transfers made by a decedent long before the Revenue Act of 1916 was passed. This court held that the Federal Estate Tax Law of 1916, properly construed, was not applicable because the transfers were not made in contemplation of death and also because the act did not apply to transactions completed before its effective date. The reasons for this decision, which differed slightly from those given in the case of Shwab v. Doyle, 258 U. S., 529, because in that case the transfer was in contemplation of death, are stated in the opinion in this case which reads in part as follows, page 544:

"At the time of the transfers there was no law of the State of California imposing any transfer or inheritance tax, nor was there a law of the United States to that effect, and all of the transfers were intended to take effect in possession and enjoyment upon their date. The act of Congress, therefore, should not be construed to be retroactive, and, if so construed, was in violation of the Constitution of the United States in that it would take the property of plaintiffs without due process of law in violation of the Fifth Amendment, and would not be, besides, a transfer tax but would be a direct tax thereon in violation of Article I, Section 9, subdivision 4 of the Constitution of the United States, because not laid in proper relation to census or enumeration as therein provided."

In the Revenue Act of February 24th, 1919, Congress sought to overcome the effect of the decision in the case of *Levy v. Wardell*, and also that of its companion case, *Shwab v. Doyle*, 258 U. S. 529, by adding to the sections referring to estate taxes, words clearly indicating the intention that the Act should cover all transfers made in contemplation of death whether or not they were completed before or after the date that the Act was passed. In the case of *Nichols v. Coolidge*, decided May 31st, 1927, Adv. Op. June 15, 1927, page 797, it was held that section 402 (c) of the Act of February 24, 1919, in so far as it required the inclusion in the gross estate of the value of the property transferred by a decedent prior to its passage, was so arbitrary and capricious as to be confiscatory and to offend the Fifth Amendment. The opinion of the court written by Mr. Justice McReynolds reads in part as follows:

"This court has recognized that a statute purporting to tax may be so arbitrary and capricious as to

amount to confiscation and offend the Fifth Amendment. Brushaber v. Union Pacific R. R. Co., 240 U. S., 1, 24; Barclay & Co. v. Edwards, 267 U. S. 442, 450. See also Knowlton v. Moore, 178 U. S. 41, 77. And we must conclude that Section 402 (c) of the statute here under consideration, in so far as it requires that there shall be included in the gross estate the value of property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious and amounts to confiscation. Whether or how far the challenged provision is valid in respect of transfers made subsequent to the enactment, we need not now consider."

We respectfully submit that if the provisions of the Revenue Act of 1924, which imposed the gift tax, have been properly and correctly construed by the government to apply retroactively that they are invalid and unconstitutional under the decisions above cited. The transactions are identical in every respect. In each instance there was an absolute gift *inter vivos* which was made and completed long before the tax statute was enacted, and neither transfer was made in contemplation of death. It necessarily follows then that if Congress may not impose a retroactive excise tax on the transfers involved in the cases of *Nichols v. Coolidge* and *Levy v. Wardell*, it also may not levy a retroactive excise tax upon the transfer involved in the case at bar.

Respectfully submitted,

DANIEL J. KENEFICK,
LYMAN M. BASS.

To:

MARK NORRIS,
Counsel for Plaintiff-in-Error,
HON. JOHN G. SARGEANT,
Attorney-General of the United States,
Counsel for Defendant-in-Error.

PLEASE TAKE NOTICE, that the motion for leave to file the foregoing brief as *amici curiae* will be submitted to the Supreme Court of the United States, October 3rd, 1927, at 12:00 o'clock noon or as soon thereafter as counsel can be heard.

DANIEL J. KENEFICK,
LYMAN M. BASS,
Office & P. O. Address,
Marine Trust Building,
237 Main Street,
Buffalo, New York.

PETITION.

(Filed April 25, 1927.)

IN THE COURT OF CLAIMS.

HELEN S. SCHMIDT, *Plaintiff*, against UNITED STATES OF AMERICA, *Defendant*.	No. H-169.

To the Honorable, the Court of Claims:

The above named claimant, Helen S. Schmidt, by Kenefick, Cooke, Mitchell & Bass, her attorneys, respectfully shows to this honorable court, upon information and belief:

FIRST: That at all the times hereinafter mentioned claimant was and now is upwards of twenty-one (21) years of age, a citizen of the United States, and a resident of the City of Buffalo, County of Erie and State of New York.

SECOND: That heretofore and on or about the 17th day of May, 1924, claimant being then the lawful owner and holder of twenty-eight thousand (28,000) shares of the common stock of The Niagara Falls Power Company, a New York corporation with its principal office in the City of Niagara Falls, New York, duly assigned, transferred and set over to each of her four (4) children, Hans Schmidt, Jr., and Walter S. Schmidt of the said City of Buffalo, Marie Louise Schmidt of Derby, Erie County, New York, and Elsie Schmidt Klopp of the City of Niagara Falls, New

York, solely in consideration of natural love and affection, seven thousand (7,000) shares of said common stock of said The Niagara Falls Power Company.

THIRD: That on the day of said gift the market value of the common stock of said The Niagara Falls Power Company was Forty-six Dollars and Seventy-five cents ($46.75) per share, and the market value of the said twenty-eight thousand (28,000) shares given to her children as aforesaid, was one million, three hundred nine thousand dollars ($1,309,000.00).

FOURTH: That thereafter the Act of June 2, 1924, Ch. 234, 43 Stat. L. 253, known as the Revenue Act of 1924, was enacted by the Congress of the United States and signed by the President, and became effective on the 2d day of June, 1924; that under Title III, Part II, of said Act, a tax was imposed upon transfers by gift during the calendar year 1924 and each calendar year thereafter.

FIFTH: That thereafter and on the 12th day of March, 1925, the Collector of Internal Revenue at Buffalo, New York, duly granted claimant an extension of thirty (30) days from March 15, 1925, within which to file her return for federal gift tax for the calendar year 1924.

SIXTH: That thereafter and on the 14th day of April, 1925, claimant duly filed with the Collector of Internal Revenue at Buffalo, New York, her return for federal gift tax for the calendar year 1924, in which she duly reported the gifts made to her children as aforesaid, and duly paid to the said Collector the sum of one hundred fourteen thousand, eight hundred and fifty dollars ($114,850.00), being the amount of the gift tax assessed upon her said return.

Said return was filed and said tax was paid under due written protest.

SEVENTH: That thereafter the said Collector applied one thousand, one hundred forty-eight dollars and fifty cents ($1,148.50) of said payment to interest alleged to have accrued on said tax from March 15, 1925, the due date for filing the return and payment of the tax, to the date when said return was filed and said tax was paid; that thereafter and on or about the 18th day of June, 1925, an alleged deficiency by reason of the application of the said sum of one thousand, one hundred forty-eight dollars and fifty cents ($1,148.50) to the payment of interest as aforesaid, was assessed against claimant in the sum of one thousand, one hundred forty-eight dollars and fifty cents ($1,148.50) with interest thereon in the sum of twenty-six dollars and eighty cents ($26.80), amounting in all to the sum of one thousand, one hundred seventy-five dollars and thirty cents ($1,175.30), which said sum claimant paid to the said Collector under due written protest on the 25th day of June, 1925.

EIGHTH: That on the 16th day of April, 1925, claimant duly filed with the Collector at Buffalo a claim for refund of said tax for one hundred fourteen thousand, eight hundred and fifty dollars ($114,850.00) with interest, and thereafter and on the 27th day of July, 1925, said claim for refund was rejected by the Commissioner of Internal Revenue for the full amount thereof.

NINTH: That thereafter Title III, Part II, of the Revenue Act of 1924, was repealed as of January 1, 1926, by the Act of February 26, 1926, known as the "Revenue Act of 1926" and by Section 324 of said Revenue Act of 1926

the rates prescribed in Section 319 of the Revenue Act of 1924 were modified and reduced, and as so modified and reduced were made applicable to returns for federal gift taxes for the calendar years 1924 and 1925.

TENTH: That thereafter and on the 30th day of March, 1926, pursuant to the provisions of Section 325 of the Revenue Act of 1926, and without waiving, relinquishing or releasing her right to recover the whole amount of the tax paid with interest, claimant duly filed a claim for refund in the sum of thirty-seven thousand, eight hundred seventy-six dollars and twenty-seven cents ($37,876.27), which said sum represented the difference between the principal amount of the tax and interest assessed against and paid by her as aforesaid, and the principal amount of tax and interest assessable under said Section 324 of the Revenue Act of 1926; that said claim for refund was duly allowed in full by the Commissioner of Internal Revenue on the 19th day of November, 1926.

ELEVENTH: Claimant is advised and therefore avers that the imposition and collection of said tax and interest thereon from claimant was wrongful, erroneous, illegal, unconstitutional and void for the reasons, viz.:

1. That the tax imposed under Title III, Part II of the Revenue Act of 1924, is a direct tax and in violation of Article I, Section 2, Clause 3, and Section 9, Clause 4, of the Constitution of the United States, because not laid in proportion to the census and apportioned among several states, as provided by the Constitution.

2. That the collection of said tax was a taking of claimant's property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

3. That the gifts made by claimant were not within the purview of the said Title III, Part II, of the Revenue Act of 1924, and that if said gifts were within the purview of said Title, said Title may not legally be retroactively applied to impose a tax upon gifts made prior to June 2, 1924, because said tax would be unavoidable and therefore a direct tax in violation of Article I, Section 2, Clause 3, and Section 9, Clause 4, of the Constitution of the United States, and collection of said tax would be a taking of property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

4. That the tax on gifts is void because it is unreasonable and of a capricious classification, in violation of the Fifth Amendment to the Constitution of the United States.

5. That the collection of the tax resulted in the taking of claimant's property for a public use without just compensation, in violation of the Fifth Amendment to the Constitution of the United States.

6. That if said tax is an indirect tax it is not uniform throughout the United States, and is void under Article I, Section 8, Clause 1 of the Constitution of the United States.

TWELFTH: Claimant avers that no action upon this claim, other than herein set forth, has been taken before the Congress or other of the Departments of the Government, or in any Court other than the petition filed in this Court; that claimant is the sole owner of the claim herein sued upon, and that no assignment or transfer of the said claim or any part thereof or any interest therein has been made; that claimant is justly entitled to the sum of seventy-

eight thousand, one hundred forty-nine dollars and three cents ($78,149.03) with interest from the United States of America, after allowing all just credits and off-sets; that claimant has at all times borne true allegiance to the government of the United States and has not in any way voluntarily aided, abetted or given encouragement to rebellion against the said government, and that she verily believes the facts stated in this petition to be true.

WHEREFORE, claimant prays for judgment in her favor and against the United States for the said sum of seventy-eight thousand, one hundred forty-nine dollars and three cents ($78,149.03), with interest.

HELEN S. SCHMIDT,
By HANS SCHMIDT, JR.,
Attorney-in-Fact.

KENEFICK, COOKE, MITCHELL & BASS,
Attorneys for Claimant,
Office and Postoffice Address:
1330 Marine Trust Building,
237 Main Street,
Buffalo, New York.

State of New York, }
County of Erie. } ss.:

HANS SCHMIDT, JR., being duly sworn, deposes and says that he resides in the City of Buffalo, New York, and is the attorney-in-fact for Helen S. Schmidt, the above named claimant, and that he is duly authorized to present this petition and make this verification; that he has read

the foregoing petition signed by him on behalf of said claimant, and that the same is true except as to those matters therein alleged upon information and belief, and as to those matters he believes it to be true.

HANS SCHMIDT, JR.

Subscribed and sworn to before me this 23d day of April, 1927.

THOMAS F. FANNING,

(SEAL) *Notary Public in and for Erie County, New York.*

FILED
OCT 3 1927
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States.

No. 154

JOHN W. BLODGETT,

Plaintiff-in-Error,

vs.

CHARLES HOLDEN, U. S. Collector of Internal Revenue for the Fourth Collection District of Michigan,

Defendant-in-Error.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF AS AMICUS CURIAE.

HENRY G. GRAY, ESQ.,
GEORGE GRAY ZABRISKIE, ESQ.,
Of Counsel.

SYLLABUS.

PAGE

Notice for leave to file brief as *amicus curiae*..... 1

Petition for leave to file brief as *amicus curiae*..... 2

Introduction 3

Preliminary matters 4

POINTS OF ARGUMENT.

POINT I: A gift tax is a property tax and hence unconstitutional..... 5

(1) Analysis of a legal right..... 5

(2) The element of protection of the state in a tax 8

(3) Analysis of a gift..... 9

(4) A gift distinguished from other transactions which have been furnished the basis of an excise tax 16

(a) Sale 16

(b) By Will or Intestacy 16

(c) Miscellaneous excise taxes..... 17

(5) Summary of the nature of a gift compared with other taxes..... 19

POINT II: To uphold the gift tax would practically abolish the constitutional distinction between direct and indirect taxes..... 20

POINT III: The gift tax is so capricious as to violate the fifth amendment..... 22

POINT IV: The gift tax amounts to a deprivation of freedom of contract and liberty. It effects a confiscation of property..... 28

Authorities Cited.

PAGE

Allgeyer v. *Louisiana*, 165 U. S. 578 ..... 5 30

Child Labor Cases, 259 U. S. 20 21

Dawson v. *Kentucky Distilleries Co.*, 255 U. S. 288 .. 14

Flint v. *Stone Tracy Co.*, 220 U. S. 151, 152 21
Frew v. *Barnes*, 12 Fed. (2nd) 624 9

Gardner v. *Hall*, 61 N. C. 21 8

Holy Trinity Church v. *U. S.*, 143 U. S. 457, 465, 468, 470 10
Hylton v. *U. S.*, 3 Dallas 171 ..... 18 20

Knowlton v. *Moore*, 178 U. S. 41, 55 17

Lewellyn v. *Frick*, 268 U. S. 238 23

N. Y. Trust v. *Eisner*, 256 U. S. 345 17
Nicoll v. *Ames*, 173 U. S. 509 16
Nicholls v. *Coolidge*, 47 Sup. Ct. Rep. 710 ..... 5 22

Pierce v. *U. S.*, 252 U. S. 200 18
Pollock v. *The Farmers' Loan & Trust Co.*, 157 U. S. 429 13

Thomas v. *U. S.*, 192 U. S. 363 ..... 16 21

Union Refrigerator Transit Co. v. *Kentucky*, 199 U. S. 194 8

Treatises Cited.

Holland, Jurisprudence, 10th Edition 6 12
Holmes, The Common Law 6

Ihering, Geist des Romischen Rechts III, 4th Edition 7

Maine, Ancient Law 11

Salmond, Jurisprudence, 7th Edition 7
Stone, Law and Its Administration 7

Vinogradoff, Common Sense in Law 7

IN THE

Supreme Court of the United States.

No. 779.

JOHN W. BLODGETT,

Plaintiff-in-Error,

vs.

CHARLES HOLDEN, U. S. Collector of Internal Revenue for the Fourth Collection District of Michigan,

Defendant-in-Error.

Notice for Leave to File a Brief as *Amicus Curiae*.

You will please take notice that the undersigned, acting as counsel for a litigant interested in the questions involved in the above entitled suit, likewise interested in a pending litigation in the Court of Claims of the United States, will move the Court at the opening of the Court on the 3rd day of October, 1927, or as soon thereafter as counsel can be heard, for leave to file a brief as *amicus curiae*, and for such other or further relief as may be proper.

New York, September 1, 1927.

HENRY G. GRAY, Esq.,
GEORGE GRAY ZABRISKIE, Esq.,
Of Counsel.

To

MARX NORRIS, Esq.,
Attorney for Taxpayer
Plaintiff-in-Error.

HON. WILLIAM D. MITCHELL,
Solicitor General.
Dept. of Justice, Washington, D. C.

HON. HERMAN J. GALLOWAY,
Assistant Attorney General.
Dept. of Justice, Washington, D. C.

Petition for Leave to File Brief as *Amicus Curiae*.

IN THE
SUPREME COURT OF THE UNITED STATES.
No. 779.

JOHN W. BLODGETT,
Plaintiff in Error,

vs.

CHARLES HOLDEN, U. S. Collector of Internal Revenue for the Fourth Collection District of Michigan,
Defendant in Error.

The undersigned respectfully petition this Honorable Court for leave to file a brief as *amicus curiae* in the above entitled suit.

Your petitioners apply as counsel for Josephine S. Gosslwin, who is the plaintiff in a cause now pending in the United States Court of Claims entitled: "Josephine S. Gosslwin, plaintiff against The United States of America, defendant", No. F 53.

The issues presented in said above mentioned suit include determination of the validity and constitutionality of the so-called Gift Tax, or Sections 319-324 of the Revenue Act of 1924.

Your petitioners' client has paid a tax in the amount of $149,865. She seeks to recover this sum, and your petitioners believe that this amount is substantially larger than any other Gift Tax now before any court or any litigation now pending.

Your petitioners' client would be affected by the decision of the questions involved in the above mentioned suit of Blodgett v. Holden.

Notice of this application having been served upon the counsel for the respective parties in the above entitled suit all of which is respectfully submitted for the consideration and action of the Court.

Washington, D. C., September 1, 1927.

HENRY G. GRAY,
GEORGE GRAY ZABRISKIE,
Of Counsel.

IN THE

Supreme Court of the United States.

No. 779.

JOHN W. BLODGETT,

Plaintiff-in-Error,

vs.

CHARLES HOLDEN, U. S. Collector of Internal Revenue for the Fourth Collection District of Michigan,

Defendant-in-Error.

Introduction.

This brief is submitted by counsel as *amicus curiae* for the taxpayer, Mrs. Josephine Goodwin, who in April, 1924, several weeks before the date of the signing of the Revenue Act of 1924 by the President on June 2, 1924, conveyed to her three sons approximately $1,500,000 of property, consisting largely of New York City residential property and State and Municipal bonds; in other words, property not subject to the Federal Income Tax. The sons unconditionally agreed to pay her a sum equal to 2% of the value of the securities at the date of transfer, for the rest of her natural life. She filed her return and paid a tax of about $150,000 under protest, on the ground that the tax deprived her of liberty and property without due process of law, and contrary to the Fifth Amendment. Her suit to recover this sum is now pending in the Court of Claims and is awaiting the result of the Court's decision herein.

Counsel herein have perused the briefs submitted on behalf of the taxpayers in the Circuit Court of Appeals and will not attempt to trace the ground so ably gone over therein. However, it is believed that some arguments of a different nature or presenting considerations from a different viewpoint, may not be amiss.

Preliminary Matters.

In order to narrow the issue as much as possible, the attention of the Court is respectfully invited to the following matters which it is believed will not be disputed:

1. The Gift Tax is not apportioned among the States and, therefore, to be constitutional it must not be a tax on property or an essential equivalent of property, but an indirect excise tax. Conversely if it is a tax on property, it must be apportioned.

2. An excise tax, to be valid, must be a tax upon the exercise of some legal right or privilege. The terms "right" and "privilege" have been held synonymous in many decisions involving excise taxes and, therefore, in this brief, the word "right" will be used. The Government's contention is that the making of a gift is a right, the exercise of which may be taxed by the Federal Government as an excise, without being apportioned.

3. The congressional power of taxation is subject to the clause of the Fifth Amendment which concerns the taking property without compensation, or depriving one of liberty, without due process of law. There are some dicta in some decisions to the contrary, but it is now clear that

the taxing power is limited by the amendment at least if the tax is arbitrary or capricious, *Nicholls v. Coolidge*, 47 Sup. Ct. Rep. 710, decided May 31st, 1927.

4. The tendency of this Court in recent years has been in favor of disregarding the form and looking only at the substance of a tax measure. Perhaps the most striking illustration of this tendency is to be found in the *Child Labor* cases.

POINT I.

A Gift Tax is a Property Tax and hence unconstitutional.

1. *Analysis of a Legal Right.*

Many legal rights which citizens or persons possess were not created or given by the Government. This Court, usually when construing the word "liberty" in the Fifth and Fourteenth Amendments, has in effect adopted as the law of the land, the statement in the Declaration of Independence to the effect that governments are instituted to *secure* certain inalienable rights, not to create them, *Allgeyer v. Louisiana*, 165 U. S. 578. It is, therefore, apposite to consider whether or not the so-called right to make a gift is a right given or protected by the law and hence taxable as an excise.

A legal right is contrasted with a moral right, and the distinction lies, of course, in the enforcement of the right. A legal right is enforced by the State, usually through the Courts, whereas a moral right is one enforced, not by the State, but by an indeterminate body, *e. g.*, by public opinion be levied only upon the exercise of a legal right. It may well be, of course, and undoubtedly frequently is true, that for such proposes a legal right and a moral right are the same.

It is perhaps difficult to find a more satisfactory definition of a legal right than that given by *Holland* (Jurisprudence, 10th Ed. Ch. 7, p. 79):

> "A capacity, residing in one man of controlling, *with the assent and assistance of the State* the actions of others."

Holland then proceeds to analyze a legal right dividing it into the following component parts (ch. 8):

> 1. The owner of the right, whom he called "The person of inherence".
>
> 2. The object over which the right is exercised, *e. g.*, a piece of land.
>
> 3. The acts or forbearances which the person of inherence is entitled to exact.
>
> 4. The person or persons against whom the right is asserted, whom he calls "The person of incidence".

Other well known definitions of legal rights are the following:

> *Holmes, "The Common Law"*, page 214. "A legal right is nothing but a permission to exercise certain natural powers, and upon certain conditions to obtain protection, restitution, or compensation by the aid of the public force * * *. Every right is a consequence attached by the law to one or more facts which the law defines, and wherever the law gives anyone special rights not shared by the body of the people, it does so on the ground that certain special facts, not true of the rest of the world, are true of him * * *"

Ihering. "Rights are legal protected interests," Geist des Romischen Rechts III, page 339, Fourth Edition.

Stone, "Law and its Administration," page 51. "In substance, a man's legal right is his sphere of freedom of action with respect to others and things as it is fixed and defined by law. We say that law protects a man's rights, meaning thereby that his use and enjoyment of things and the freedom of his person and his character or reputation are protected from anti social interference and injury by the rules of law which visit certain penalties on those who are guilty of such interference."

Ibid, page 52. "Thus, when we speak of one's right, we mean his right successfully to apply to the Courts and set them in motion, because some one has done him a wrong, either for the purpose of restraining a violation of law, or recovering damages for its violation; or in the case where the right is to possess property, to have the property turned over to the person entitled to possess it. Thus, all rights, in their last analysis, are rights to apply to some court for its relief, and generally speaking, rights exist only where there is some remedy for their invasion, afforded by some court. If there is no remedy there is no right."

Every right implies a duty, *Vinogradoff*, "Common Sense in Law" (Ch. 3).

Salmond, "Jurisprudence," Seventh Edition, page 240. "Rights and duties are necessarily correlative. There can be no right without a corresponding duty, or duty without a corresponding right, any more than there can be a husband without a wife or a father without a child."

2. *The Element of Protection of the State in a Tax.*

In every tax there should be, from a sociological and economic standpoint, and, according to many decisions (some of them of this Court), from a legal standpoint as well, an element of protection from the State, in return for which, in whole or in part, the tax is levied. On this theory alone can be justified the levying of an income tax on American citizens residing abroad, who derive all their income from foreign sources, *e. g.*, an American engaged in business in England. As he is an American citizen, the State Department will protect him should he need it. It is unnecessary to discuss the question as to whether taxation and protection are entirely correlative, although in *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, this Court said that such was the case. In *Gardner v. Hall*, 61 N. C. 21, a decision of peculiar interest because it treats of a capitation tax, which the constitution calls a direct tax, the Court said:

> "A capitation tax is one upon a person simply, without any reference to his property, real or personal, or to any business in which he may be engaged, or to any employment which he may follow. It is rightfully imposed, *because of the protection which the Government affords* to the person, independently of the connection or relation of the person to anything else."

The Gift Tax, on the other hand, is imposed only if, as, and when the taxpayer ceases to need protection. The Government may contend that the Gift Tax is levied, not upon a right, but upon a privilege. Some jurists, such as Hohfeld, attempt to draw a subtle distinction between a right and a privilege. Others disregard the distinction entirely. The word "privilege"

cannot be found even in the indices of such works on jurisprudence as Holland, Holmes, Pollock, Salmond, Stone and Vinogradoff. Dean Pound of Harvard Law School has said of Hohfeld's analysis that it is quite without jural significance. Finally, the courts, in construing excise taxes, have distinctly stated that it is immaterial whether the occasion of the levying of an excise is the exercise by the taxpayer of a right or a privilege. *Frew* v. *Barnes*, 12 Fed. (2nd) 624.

3. *Analysis of a Gift.*

Property consists of certain elements. These are known by various other terms such as rights of property, attributes or incidents of property. To speak of attributes or incidents of property is often misleading. It tends to further the concept that property is the tangible physical object. In many opinions "property" is used in this latter sense. The loose use of the term "property" is responsible for many of the apparently conflicting decisions in respect of taxation. The term "property" is used more correctly to signify rights in or to an object. Originally there was no property except in a physical sense, nor any law. But these institutions have developed and in the development property became endowed with certain fundamental elements apart from law. These elements are possession, use, and gift. After discovery of the physical object the first elements of property must have been possession and use. Practically coincident with these came that of gift.

The gift of property, or the exercise of property by way of gift or the gift value of property attached itself as a fundamental element of property not by any statute or decree nor by any man-created law but originated and became firmly established as a social and moral expres-

sion of the race before law came into being. The transfer of property by gift is as fundamental as the so-called right or exercise of self defense. Courts have been unanimous in holding that the right of self defense is not a right founded upon law but rather upon natural instincts which when law came into existence was acknowledged by it and secured by it.

The Revenue Act of 1924 places a tax upon gifts. In order to decide whether such a tax is valid, it must first be determined concerning the nature of gifts.

In the lives of primitive peoples their deities were the objects most revered and likewise feared. Consequently their graven images received from them worship and adulation in the highest form conceivable by them. The tangible form in which this worship was shown was by gifts, varying from fruits of the field to their own children. Discoveries and conquests were undertaken and property of their enemies reduced to possession solely to offer it to their gods or as gifts to friendly potentates.

History records amongst all races costly gifts were presented as tokens of esteem, affection, appreciation and to solicit favor or gain rewards.

Under the Christian doctrines, the importance of the gift value of property has been manifoldly increased. It can be safely asserted that giving of one's property to others is one of the chief tenets of the Christian church. The principle that "He that hath shall give" has been part of the Christian nations' philosophy long before Common or Statute Law, as we know it, came into effect. Christianity is part of the Common Law, *Holy Trinity Church* v. *United States*, 143 U. S., 457, 465, 468, 470.

The unit of our social structure, the family, has been

wholly dependent upon gifts. The *paterfamilias* worked and acquired, not for himself alone, but to enable him to give to others of his family, either incapable of work or less fortunate than himself. In the majority of cases his desire to obtain acquisition of physical property is for the direct purpose of giving it away.

The elements of what we call property have never been fixed by legislative fiat. They have developed as the race advanced. Judicially they have been formed by the importance attached to each element. Such elements are derived from the moral and social viewpoint of the community. In early stages he who acquired possession did so by his individual strength. He defended his use of the property and his disposition of it in the same manner if questioned. A state of society based upon the doctrine of private property must recognize the historical development of private property. In this development the gift element of property has been as outstanding a characteristic even more than the use and possession.

Various attempts have been made to define property. The concept is best secured by reviewing its development historically. Blackstone says, "The origin of private property is probably founded in nature," and by nature he probably means nothing other than gradually evolved from earliest times. Many of the elements of property are not created by law. Maine (Ancient Law, Ch. 8, Early History of Property) follows Savigny in stating that ownership grew out of possession, ripened by prescription. By way of summary, physical property acquired its value by reason of attaching to the physical object certain fundamental qualities. It is contended that these natural qualities are property.

The argument used now to sustain the Gift Tax

attempts to distinguish between property and the transfer of the property, claiming that the property is something separate and apart. Secondly, the Government claims that even though the right to make a gift be a natural right, an excise may be levied upon the exercise of that right.

The first contention ignores the accepted definition of property, purporting to assign to it a restricted physical meaning.

The second contention attempts to make a distinction where none exists. A right only comes into being by its exercise. Metaphysically considered only, may it exist apart from its exercise. (Holland, "Jurisprudence," Ch. 10, "Rights at Rest and Rights in Motion".) The right of gift is property. The gift is accomplished only by the exercise of the right. If there is no exercise of the right there is no gift. If the exercise of the right is prohibited, the gift and thus a part of the property is destroyed. If the exercise is taxed, the gift and thus the property is taxed.

It is absurd to say that use of property (which is one of its elements) is different from the exercise of that use, the use itself being the exercise of property rights to which the owner is entitled.

Were the contention of the Government sound, it would destroy all prevailing concepts of property. Property rights are to be limited by the Government's definition to mere passive rights of possession, use and disposition. When the property owner seeks to enjoy his property in any form (which by definition is what constitutes property) they would say he merely exercises a right which is something apart from his property and thereby

taxable. They thus set up in effect a new concept of property and abolish the term as known at Common Law.

Concretely it would amount to this. A man has valuable silverware which, being his property, we say he has a right to use. A tax on this property would be a direct property tax, but if he places it on his table, thus exercising his right to use it, the tax ceases to be a property tax. Query, must he lock it in a safe and refrain from exercising any of his rights? If so, what becomes of the value of the silver? To him it no longer has value. Since it is the exercise of the right to use which gives it property value, surely a tax on the exercise is a tax on property.

There is no need at present for theoretical argument. This Court has held that a tax on the income of property is a tax on the property itself. *Pollock* v. *The Farmers' Loan and Trust Co.*, 157 U. S. 429. The income is, however, merely the exercise of a right to use the property in a certain way, *i. e.*, to produce income. The property could just as well lie idle. The present issue was squarely met in the *Pollock* case. It was there decided that a tax on the exercise of property was a tax on the property itself and thus a direct tax.

The Court further said that it was "not decided that duties, imposts and excises which are not the essential equivalent of a tax on property generally, real or personal, solely because of its ownership, must be converted into direct taxes, because it is conceived that it would be demonstrated by close analysis that they could not be shifted from the person on whom they first fall". By this statement the Court merely declared that inability to shift the tax was not an absolute test for a direct tax.

Actually, by this declaration the Court strengthened its previous pronouncement by saying that property in its exercise was nevertheless property and an excise of the type of an income tax was a direct tax. An income tax being a tax on the exercise of the right to use, a Gift Tax on the right to give here falls directly into this classification.

The other case involving fundamental elements of property is the *Dawson* case, 255 U. S. 288.

This is the more weighty because the facts were practically analogous to the instant case. A tax was there attempted to be levied on the act of the owner in taking his property out of storage into his own possession.

The Supreme Court then stated the principle which it is submitted controls this case. They said "*The whole value of the whiskey depends upon the owner's right to get it* from the place where the law has compelled him to put it *and to tax the right is to tax the value*".

Let us analyze this:

1. The act of removing the property is the thing taxed, i. e., the exercise of the right to remove.

2. Clearly the right to remove is not taxed because the owner has at all times the *right* to remove. However, this is not taxable so long as the owner does nothing and is willing to content himself with his bare unproductive and quite valueless right.

3. The value (property) to him consists in

his ability to exercise his rights in connection with the whiskey.

4. The Court held that a tax on value was a property tax and, therefore, direct and must be apportioned.

This is a clear enunciation that the exercise is the value and this value the property.

An argument which divides property into active and passive rights, and then by fiat calls the passive rights the fundamental property rights which must not be taxed except indirectly, and the active rights the exercise of these fundamental rights, violates age-long legal concepts.

By way of example: A farmer has a field; he walks on it, he plows it and raises corn from it. The Government would say that each of these acts is the exercise of a right which he has to do these things. Yet apart from these things his land is but a collection of certain chemicals of no value to anyone. It becomes valuable and is his valuable property only by its exercise. The exercise is his property. By way of illustration, as a common field it may have a value of $10, where his cattle may graze together with his neighbor's. As a field around which he has a right to build a fence it has a value of $50, for his cattle alone benefit thereby. As a field which he may plant and sow it has a value of $150. Each of these rights in its exercise is a definite property, making a total property of $150. Taxation of any one fundamental element is a property tax.

4. *A Gift Distinguished from Other Transactions which have Furnished the Basis of an Excise Tax.*

A. *Sale.*

Congress has at times levied taxes, usually in the form of stamps, upon transfers of stock certificates (*Thomas* v. *U. S.*, 192 U. S. 363), transfers by deed of real estate, and sales on the floor of a produce exchange (*Nicoll* v. *Ames*, 173 U. S. 509).

In the case of the sale of stock certificates, the Court upheld the tax on the theory that the vendor stockholder was availing himself of the right or privilege of disposing of a pro rata beneficial interest in the property of the corporation in question by the convenient form of handing over pieces of paper. In the case of deeds to real estate, the parties are not only given the advantages of the recording acts, but also are given a convenient way of transferring realty, instead of, for example, by the elaborate method of livery of seisin. In the case of sales on the produce exchange, the tax was on the privilege of using there offered, as opposed to a tax on every sale, which would be a property tax (*Nicoll* v. *Ames*).

B. *By Will or Intestacy.*

The Act levying a tax upon transfers upon death makes no distinction between transfer by will or by intestacy. This shows convincingly that there was no thought that the tax was upon the exercise of a right by the decedent to transfer his property by his own act, even assuming a decedent could accomplish such a result.

It is submitted that a man upon death, being no longer able to control or enjoy any of the elements of his property, he abandons it. Any legal effects given to his will or descent by laws of intestacy are created by the state.

> "The right to take property by devise or descent is a creature of the law and not a natural right—a privilege, and therefore the authority which confers it may impose conditions upon it" (*Knowlton* v. *Moore*, 178 U. S. 41, 55).

This Court has upheld the estate tax, not because on the death of the intestate someone acquires rights to succeed to the property, but because the state or the Federal Government has the historic right to govern or impose conditions in the shape of taxes, upon the devolution of property upon the death of the last owner.

The estate tax is distinctly *sui generis*, and can hardly be used as an analogy for any other tax whatsoever. Again, there are historic grounds for this tax, existing since the days of the Romans, who gave us our system of inheritance and wills. Historically, the estate tax has always been considered an excise tax, and to quote Mr. Justice Holmes, "Upon this point, a page of history is worth a volume of logic" (N. Y. *Trust* v. *Eisner*, 256 U. S. 345).

C. *Miscellaneous Excise Taxes.*

From time to time, various federal excise taxes have been upheld, such as occupational taxes, *e. g.*, the right to pursue the vocation of liquor dealer, broker; the right

to use foreign-built yachts; the right to refine sugar; the right to manufacture tobacco products, automobiles, etc.

For most of these there is an historical basis. An excise tax is a tax on the manufacture or use of consumable goods, or the pursuit of a certain calling, according to the ordinary meaning of the term. It is admitted that the term has been extended, by judicial construction, beyond that sense. But in all these cases there is, in addition to the historical basis, the element of protection or invoking the aid of the state. The owner of a foreign-built yacht may have occasion to invoke the aid of the State Department in case of complications with a foreign government, or of the Court of Admiralty, in case of a collision, *e. g.*, in America. The broker may have to sue for commissions. The sugar refiner may need all sorts of protection, from the police, fire departments, the courts, etc. This should be paid for. The owner of a carriage (*Hylton* v. *U. S.*, 3 Dallas 171; or the modern equivalent, the motor car, has to use the public roads which the state must maintain. It may well be doubted whether the state could tax an unused carriage any more than it could tax an unused foreign-built yacht (*Pierce* v. *United States*, 232 U. S. 290).

An analysis of these cases should furnish a definition of an excise tax. At least from the several acts there taxed and the facts surrounding them, there will appear the nature of an excise tax in the mind of the courts. In these cases the exercise of a legal right and privilege has been interpreted to mean the taking advantage of rights and privileges conferred by the state.

5. *Summary of the Nature of a Gift Compared with Other Taxes.*

The donor is taxed for completing a transaction which gives him no economic benefit, which never can result in his needing or invoking the protection of the state or the Federal Government, which results in conferring upon the donee a right *in rem*, good against all the world, including the donor, and which has no historical basis. The legal nature of a gift or the so-called "right to make a gift" is so totally different from that of any other juristic acts or "rights" which may properly form the basis for an excise tax that no argument from analogy may properly be drawn.

The making of a gift is not accomplished by availing oneself of any right or privilege conferred by law. Nor is it any right arising out of business or commercial matters and thus a subject of regulation by the state. Rather it arises out of social right and cannot properly be made the subject of an excise. Compare the act of doing business in a certain manner or using certain restricted commodities or taking advantage of certain benefits conferred by statute, with a gift to a friend, of a cigar, a dinner, or shelter, or presents to one's family at Christmas time and, the distinction is obvious.

POINT II.

To uphold the gift tax would practically abolish the Constitutional distinction between direct and indirect taxes.

The distinction between direct and indirect taxes, so clearly laid down in the Constitution, must be preserved. The political situation in existence at the time of the drawing up of the Constitution required the insertion of this clause about apportionment, without which the southern states would have been at the mercy of the other states (*Hylton v. United States*, 3 Dallas 171), and hence would not have consented to the adoption of the Constitution. It may well be with the advance of civilization, with its resulting complexities, and with the necessity of raising new taxes for increased governmental expenditures, that, from an economic or political standpoint, this distinction should be wiped out. But unless and until a constitutional amendment abolishes the distinction, it should not be strangled in a network of judicial niceties by calling any kind of a tax a tax on an alleged "right", and hence a valid excise tax.

The founders of the Constitution, whether wisely or not, drew a very careful distinction between direct and indirect taxes. Much confusion has resulted from the decisions of the courts in marking out a clear distinction between the two. Various tests which have at one time been deemed decisive have subsequently been altered, *e. g.*, whether the incidence of the tax may be shifted from the taxpayer to someone else, whether a direct

tax was limited to capitation and real estate taxes, etc. The present test appears to be whether there is an absolute and unavoidable demand (*Thomas* v. *U. S.*, 192 U. S. 363; *Flint* v. *Stone Tracy Co.*, 220 U. S. 151, 152).

At the present time there is a commendable tendency to pierce the disguise of any tax and call it by its own name, regardless of the garb it may temporarily wear. With all due respect to the courts, it is contended that the net result of the various decisions in cases where the taxpayers have contended that various taxes were direct taxes has been to whittle away the constitutional, if vague, distinction of direct and indirect taxes. It is submitted that to justify the gift tax as an indirect excise tax would be to abolish the distinction altogether for the following reasons:

The fundamental elements of property are commonly given as possession, use and disposition.

If a tax on the exercise of the right of disposition is considered indirect and thus constitutional, a tax on the exercise of the rights of possession and use must be equally valid. However, there are no other rights of property, the property being the sum total of these rights.

The situation is analogous to that familiar case where there are, say, four remedies for a certain legal situation, *e. g.*, the recovery of real property, and the Legislature abolishes one of them, and claims that as there are three left, there is no deprivation of property without due process. But this argument is valid only three times. When the fourth rolls around, the Court should call a halt. Congress cannot do indirectly that which it is forbidden to do directly, *Child Labor Cases*, 259 U. S. 20.

A final analogy may be useful. Assume that Congress passes an act, taxing the marriage of a person, and measuring the tax by the amount of his wealth. The Government would doubtless contend that this is a proper tax, and is an indirect tax on the act, occasion or the exercise of a legal right or privilege, viz., contracting matrimony.

Assume, further, that Congress, stimulated by the example of Signor Mussolini, passes a tax on bachelors over, say, 30 years of age—and that while the former tax on marriages is in effect, and measures the tax by the bachelor's wealth. Surely it is the right (or privilege) of an American citizen *not* to get married.

The net result of these two hypothetical measures would be a direct poll tax, or a direct federal property tax, under the guise of indirect excise taxes on the right or privilege of marrying or not marrying.

POINT III.

The gift tax is so capricious as to violate the Fifth Amendment.

Although there may be found many dicta to the effect that the Fifth Amendment is not a check upon the taxable power of Congress, nevertheless, several recent decisions of the Court lay down the rule clearly that if the tax is capricious and arbitrary, it is unconstitutional in that it deprives persons of property without due process of the law (*Nicholls* v. *Coolidge* (*supra*)). This is especially true in view of the retroactive features of the law.

A. First of all it must be observed that the tax is posed upon all residents of the United States, and on all non-residents as to gifts of property located thin the United States. Citizenship is immaterial.

It will be noted that to this extent the gift tax follows e estate tax.

In the estate tax regulations, the Government states, though there is nothing in the law to that effect, that reign real estate is not subject to the estate tax, even though the decedent may be both a citizen and a resi- nt of the United States. *There is no such similar pro- sion in the gift tax regulations.* Therefore, a British bject who was a resident of the United States for a ar or so, who in January, 1924, made a gift of land cated in England, would, according to the Government, compelled to pay a tax upon the so-called "right" hich he exercised some months before the passage of e Act. The same is true of other foreign immovables, g., leaseholds. Yet over this property the United tates has no jurisdiction (*Lewellyn* v. *Frick*, 268 U. S. 38).

B. The statute discriminates amongst the general lass of donors by taxing those who give money or things hich may be converted into money.

Two donors wish to bestow kindness upon a friend r relative of each who, being alone in the world, has o means of support. The one gives a sum of $150,000, pon the income of which the donee could live. The ther takes his friend or relative into his home, provides or his wants and gives him all the wealth which comes

from a happy and contented home life. There is no question which is the greater gift. Yet the donor who gave the money is taxed. The donor who made the greater gift is not.

C. There could be enumerated countless instances of gifts which have a value far greater than a money gift. The gift whereby a man, experienced or wise in fields of learning or business, gives his time, his interest and his inspirational quality, have often been the means of enabling a man to realize upon this gift in a valuable monetary way.

A lawyer whose time may be valued at thousands of dollars a day may spend many hours or days on a case for a friend and send no bill.

Likewise a doctor may perform the same operation for which he charges some patients $50,000, for nothing for persons who, although not charity patients, are in very reduced circumstances. Who can say the fair market value of the operation which saves a man's life? Yet the doctor, the donor, would be taxed for such operations, even though it were an emergency one, necessary to save life, and no other surgeons available, if he sent a bill and then cancelled it, out of friendship or some other reason.

If a man's marriage inspires a distinguished literary friend to write a poem or a play, to be read at the happy occasion, must the author be subjected to a gift tax if the market value of his literary efforts is over $500 per poem or per play? Would Longfellow have been subjected to a gift tax for writing "Morituri Salutamus" for his class reunion?

If a distinguished portrait painter, who gets over $500 per portrait, paints his children for the purpose of making a gift of the work to his wife for a birthday present, must he pay a tax?

If a prospective husband makes a marriage settlement on his fiancee, he must pay a gift tax. Should he not also be compelled to pay a gift tax merely by marrying her, even without a settlement, if he owns a lot of real property, and she immediately acquires valuable rights of inchoate dower or community property?

The gift law does not apply to the large majority of donors as a class but arbitrarily discriminates in a most capricious manner by placing the burden of a tax on those who give money or objects easily reducable to money.

D. If some ardent and sincere prohibitionist, such as Mr. Wayne B. Wheeler, the counsel for the Anti-Saloon League, should be made legatee under the will of some eccentric non-prohibitionist of some shares of stock in Bass' or Guiness' Company of Great Britain, and naturally refused to accept the gift, he would have to pay a tax for this expression of his social and political views, as it would be a gift to the residuary legatee or the next of kin. If Mr. Garland, the well-known Massachusetts communist, had renounced his inheritance of several hundred thousand dollars because it would be contrary to his view on sociology and political economy to take it, thus giving it to others, this would require, according to the Government, the payment of a tax on his part. If a Quaker should inherit a munitions factory, and under the intestate law become vested with title immediately on the death of his relative, his refusal to accept

it is a gift to the next heir, and he is taxed for his religious views. If Mr. Rockefeller had loaned a friend of his some money some years ago and decided some time in the early part of 1924 that he did not need the money as much as his friend did and executed a release in his friend's favor, he would have to pay a tax even though the debt consisted of a mortgage on foreign real estate. If a debtor whose debt is barred by the Statute of Limitations, makes a new promise in writing to pay the debt, he would presumably have to pay a tax for the exercise of the so-called "right" of waiving the right to set up his defense of prescription. If Sir Walter Scott, Mark Twain and General Grant (assuming that they had been alive in the year 1924) had waived the bar of a discharge in bankruptcy and proceeded to pay off their barred debts by their literary efforts, such actions would have been taxable, according to the Government, because they were exercising a "right" to pursue a course of conduct to which their moral duty urged them.

If a man of modest means, in a momentary burst of grateful enthusiasm, accepts from a wealthy benefactor (or one whom he at first regards as a benefactor) a steam yacht or a white elephant (to use a classic illustration), and the first shortly proves to be the second, and there is no market for such a commodity, he could not unload the gift on some friend of his without paying for the "right" not to keep a yacht or a proboscidean.

Some years ago, a wealthy American Anglophobiac provided in his will that if his child ever visited England, she should lose her share of the estate, which should pass to the residuary legatee. Suppose out of affection for the residuary legatee, or a desire to see the world, the child goes to Europe. Is this a gift to the residuary

legatee, and if so, is it a tax on the right to go to Europe, like a passport tax?

Finally—a wealthy, middle-aged man, in good health, with a life expectancy of many years, desires to settle on his daughter, on the occasion of her marriage, enough money to yield her $10,000 a year. Assume he takes a demand note from her and negligently or carelessly, or in a spirit of indifference, lets the Statute of Limitations run. Does this constitute a gift, and if so, in what year is the gift made? Is he justified is assuming that if he sues her, she will set up the Statute of Limitations, and hence suit is futile? Suppose the daughter, after the marriage, acquires a domicil in a state or a foreign country with a shorter statute of limitations than in the domicil of the father, and that the latter, in good faith, through ignorance of the foreign law, does nothing until the foreign prescriptive period has elapsed, although his own statute has not run. Is this a gift, and if so, when?

In view of the above, it is perhaps not too fanciful or presumptuous to state that the founders of our Constitution would be mildly startled at this version of an "excise". Possibly the gift tax is that extraordinary tax referred to by Justice White in the *Pollock* case (157 U. S. 557), which "for more than 100 years of national existence has as yet remained undiscovered, notwithstanding the stress of particular circumstances has invited thorough investigation into sources of revenue".

POINT IV.

The gift tax amounts to a deprivation of freedom of contract and liberty. It effects a confiscation of property.

A tax cannot exist theoretically. It must be judged in practical application, and this with proper regard for the contingencies which may arise.

The gift tax in effect amounts to a confiscation of property. Let us assume that a clergyman is the possessor of a Gutenberg Bible worth, we shall say, $150,000. About to depart for China he is desirous of giving it to his best friend, another clergyman, in order that it may be in safe and sympathetic hands. With no ready cash and no ability on the part of the donee to pay the tax, he cannot give it away. The gift tax law for all practical purposes changes his absolute ownership to a life estate in the property. It does not need acturial figures to illustrate that a life estate is of much less value than the fee. This reduction is a confiscation of property without any compensation whatsoever.

To show more vividly the injustice of the retroactive feature of the Act, assume that the gift was made in January, 1924, and that in May, 1924, the Bible was destroyed by fire, so that the lien of the Government for the tax could not attach. The donor might have his life's savings swept away.

The law furthermore destroys freedom of contract.

Section 323 places a tax on all sales or exchanges for less than fair consideration in money or money's worth.

This section deprives the individual of the privilege of contracting as he sees fit, and places the Government as the party who must decide how much each bargain is worth to the parties. At common law it is well established that the courts cannot make a new contract for parties.

The consideration existing in most bargains depends entirely on the conditions surrounding the particular bargain and the private affairs and state of mind of the parties concerned. These things fix the consideration. Love, affection, moral obligation, religious convictions, and social background all contribute. These are the qualities which the Government says must be reduced to money's worth, and, by the Government.

To make an evaluation on these things requires a certain standardization. And yet these very things cannot be standardized.

Strangers to a transaction can never know or appreciate the considerations which prompt the parties to reach their particular bargain.

For example, in a restricted residential community consisting of large estates where all the residents are friendly and of the same social class, a certain member has to dispose of his estate. He receives an offer of $350,000 from a friend of his own circle known to his friends and liked by them. Two other offers are made of $500,000 by men whose only qualification is money, who in other respects are totally unfitted to reside there and who would, if allowed to buy, injure the community. Considering these things, a sale is made for $350,000. Yet undoubtedly the market value of the property, as evidenced by the offers from the undesirable purchasers, would be $500,000. Yet to the seller, under the circum-

stances, the consideration to the mind of the seller was adequate. Any tax or penalty exacted would grossly violate the seller's freedom of contract.

Most of the statements made in the last point, about the capricious and arbitrary nature of the tax, apply here as well. The term "liberty" in the Fifth Amendment means much more than freedom from physical restraint—it means the right to own and hold property, to make contracts in respect thereto, etc. (*Allgeyer* v. *Louisiana*, *supra*). The restraints imposed by the gift tax in the cases heretofore mentioned are at least as vital and fundamental as the right to learn German, to be an employment agent, to work over ten hours a day in a bakeshop, or to hire Germans or Austrians.

> "In every society there is a point beyond which regulation of conduct ceases to be of social service and becomes burdensome and oppressive to the individual. This necessarily limits the field of law and leaves the control of many human relationships to the individual sense of what is right or desirable conduct" (Stone, Law and its Administration, p. 9).

The decisions of the lower Court should be reversed, and the law declared unconstitutional, both in its retrospective and its prospective features.

HENRY G. GRAY,
Amicus Curiae.

New York City.

FILED
SEP 28 1927

Supreme Court of the United States

OCTOBER TERM, 1926.

No. 154.

JOHN W. BLODGETT

against

CHARLES HOLDEN, as Collector of Internal Revenue for the Fourth Collection District of Michigan.

BRIEF FOR FANNIE E. UNTERMYER AND EDWARD D. UNTERMYER, AS EXECUTORS, AMICI CURIAE.

LOUIS MARSHALL,
Of Counsel.

The Rieder Press, 37 Warren St., N. Y. Tel. Worth 2-3-3.

INDEX.

PAGE

STATEMENT 1

POINT I—Section 319 of the Revenue Act of 1924 violates the Fifth Amendment to the Constitution of the United States, in that it deprived the donor of the gift sought to be taxed of his property without due process of law 2

POINT II—The tax imposed by the Revenue Act of 1924 on gifts *inter vivos* is a direct tax and void because not apportioned as required by Article I, §2, clause 3, of the Constitution 14

POINT III—A gift made during the calendar year 1924 and prior to June 2, 1924, the date when the Revenue Act of 1924 became a law, was not made taxable by that Act; but if intended that it should be, the Act, in so far as it related to a gift so made, was void because in violation of the Fifth Amendment to the Constitution of the United States 15

PAGE

Schlesinger v. Wisconsin (270 U. S. 230) 10
Sherman v. Elder (24 N. Y. 381) 4
Shwab v. Doyle (258 U. S. 529) 15
Smietanka v. First Tr. & Sav. Bank (257 U. S. 602) . 17
Smith v. Campbell (10 N. C. 595) 5, 7

Thomas v. United States (192 U. S. 363) 12

Union Trust Co. v. Wardell (258 U. S. 537) 17
United States v. Field (255 U. S. 257) 17

Williams v. Guile (117 N. Y. 348) 7
Wynehamer v. People (13 N. Y. 396) 3

TEXT BOOKS.

Bouvier's Law Dictionary, Baldwin's Century Edition (1926), p. 995 2
Story, Eq. Jur., Sec. 606 7

Supreme Court of the United States

OCTOBER TERM, 1927.

JOHN W. BLODGETT against CHARLES HOLDEN, as Collector of Internal Revenue for the Fourth Collection District of Michigan.	No. 154.

BRIEF FOR FANNIE E. UNTERMYER AND EDWARD D. UNTERMYER AS EXECUTORS, AMICI CURIAE.

Leave has been granted to the executors of the late Isaac Untermyer to file a brief herein as *amici curiae*. They are the petitioners in proceedings brought here by writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit. Under the title *Untermyer v. Anderson*, that cause is No. 221 on the present docket of this Court. The questions of law involved in that litigation are substantially the same as those certified in the cause specified in the caption of this brief. They relate to the constitutionality of the so-called gift tax sought to be imposed by Sections 319 to 324 of the Revenue Act of 1924, and the applicability of that Act to gifts made prior to the date when it went into effect.

When President Coolidge signed the Revenue Law of 1924, he took pains to make the precautionary statement:

> "A gift tax is a further invasion of the rights of the citizen, both unusual in nature *and of doubtful legality.*"

I.

Section 319 of the Revenue Act of 1924 violates the Fifth Amendment to the Constitution of the United States, in that it deprived the donor of the gift sought to be taxed of his property without due process of law.

At the time when the gift was made, the donor had the absolute right to deal with the subject matter of the gift, whether it consisted of realty, personalty, money, or things in action, as he saw fit. It was his property, and one of its incidents, which was in itself a property right, was the power to sell it or to give it away. A law which undertook to prohibit such a right of disposition was in effect confiscatory in its operation. If the law did not go so far as absolutely to prohibit such disposition, but imposed upon the exercise of the power a tax, it would have been *pro tanto* an invasion of the owner's property right, and, as we shall argue under Point III, especially if the taxing law were retroactive in its scope and enacted subsequent to a transfer made of the property.

It is scarcely necessary to cite many authorities in support of this fundamental principle. The doctrine is compactly stated in Baldwin's Century Edition of *Bouvier's Law Dictionary* (1926) under the title "Property," page 995:

> "When things are fully our own, or when all others are excluded from meddling with them or

> from interfering about them, it is plain that no person besides the proprietor, who has this exclusive right, can have any claim either to use them, or to hinder him from disposing of them as he pleases; so that property, considered as an exclusive right to things, contains not only a right to use those things, but a right to dispose of them, either by exchanging them for other things, or by giving them away to any other person without any consideration, or even throwing them away. Rutherforth, Inst. 20; Domat, liv. prel. tit. 3; Pothier, *des choses;* 18 Viner, Abr. 63; Com. Dig. *Biens.* See, also, 2 B. & C. 281; 9 id. 396; 3 Dowl. & R. 394; 1 C. & M. 39; 4 Call 472; 18 Ves. 193; 6 Bingh. 630."

In *Wynehamer* v. *People*, 13 N. Y. 396, 397, Judge Comstock gives expression to this idea in terms that have become classic:

> "Now, I can form no notion of property which does not include the essential characteristics and attributes with which it is clothed by the laws of society. In a state of nature property did not exist at all. 'Every man might then take to his use what he pleased, and retain it if he had sufficient power; but when men entered into society and industry, arts and sciences were introduced, property was gained by various means, for the securing whereof proper laws were ordained.' (Tomlin's Law Dic., Property; 2 Bl. Com. 34.) Material objects, therefore, are property in the true sense, because they are impressed by the laws and usages of society with certain qualities, among which are, fundamentally, the right of the occupant or owner to use and enjoy them exclusively, and his absolute power to sell and dispose of them; and as property consists in the artificial impression of these qualities upon material things, so, whatever removes the impression destroys the notion of property, although the things themselves may remain physically untouched.

> Nor can I find any definition of property which does not include the power of disposition and sale, as well as the right of private use and enjoyment. Thus Blackstone says (1 Com. 138): 'The third absolute right of every Englishman is, that of property, which consists in the free use, enjoyment and *disposal* of all his acquisitions, without any control or diminution, save only by the laws of the land.' Chancellor Kent says (2 Kent's Com. 320): 'The exclusive right of using and *transferring* property follows as a natural consequence from the perception and admission of the right itself.' And again (p. 326): 'The power of *alienation of property* is a necessary incident to the right, and was dictated by mutual convenience and mutual wants.' • • • These definitions are in accordance with the general sense of mankind. Indeed, if any one can define property eliminated of its attributes, incapable of sale and placed without the protection of law, it were well that the attempt should be made."

In *Sherman* v. *Elder*, 24 N. Y. 381, 384, Judge Allen said:

> "Property considered as an exclusive right to things contains not only a right to use them but a right to dispose of them either by exchanging them for other things or by giving them away to any other person without any consideration, or even throwing them away."

In *People* v. *Otis*, 90 N. Y. 52, Chief Judge Andrews said:

> "Depriving an owner of property of one of its essential attributes, is depriving him of his property within the constitutional provision."

In *Chicago & Western Indiana R. R. Co.* v. *Englewood Connecting Ry. Co.* (1886), 115 Ill. Rep. 375, 385, the Court said:

> "• • • for property itself, in a legal sense, is nothing more than the exclusive right 'of possess

ing, enjoying and disposing of a thing,' which, of course, includes the use of a thing."

In *Jaynes* v. *Omaha Street R. Co.* (1898), 53 Neb. 631, 653:

"* * * 'Property' in its appropriate sense means that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or objects, and generally to the exclusion of all others, and doubtless this is substantially the sense in which the word is used in the constitution, as to the taking or damaging of private property for the public use."

In *Smith* v. *Campbell* (1825), 10 N. C. 595, 597:

"Property is a thing over which a man may have dominion and power to do with it as he pleases, so that he violates not the law. He may give, grant, or sell it at his pleasure."

In *Eaton* v. *B. C. & M. R. R.* (1872), 51 N. H. 504, 511:

"The term 'property,' although in common parlance frequently applied to a tract of land or a chattel, in its legal signification 'means only the rights of the owner in relation to it.' 'It denotes a right * * * over a determinate thing.' 'Property is the right of any person to possess, use, enjoy, and dispose of a thing.' Selden, J., in *Wynehamer* v. *The People*, 13 N. Y. 378, p. 433; 1 Blackstone Com. 138; 2 Austin on Jurisprudence, 3d ed., 817, 818. If property in land consists in certain essential rights, and a physical interference with the land substantially subverts one of those rights, such interference 'takes,' *pro tanto*, the owner's 'property.' The right of indefinite user (or of using indefinitely) is an essential quality or attribute of absolute property, without which absolute property can have no legal existence. 'Use is the real side of property.' This right of user necessarily includes

> the right and power of excluding others from using the land. See 2 Austin on Jurisprudence, 3d ed., 836; Wells, J., in *Walker* v. *O. C. W. R. R.*, 103 Mass. 10, p. 14. From the very nature of these rights of user and of exclusion, it is evident that they cannot be materially abridged without, *ipso facto*, taking the owner's 'property.'"

A *fortiori*, any interference with a man's right to give is a taking of his property and a tax on giving is a taking of private property for public use without just compensation and without due process of law.

It was certainly beyond the constitutional power of Congress to enact a law which would interfere with any of these attributes of property involved in the cases cited. Consequently, a statute forbidding the owner of property to make a gift of it would be a nullity. So, likewise, would be an Act which would hamper the right of disposition by imposing conditions which would impair the right of disposition, as, for example, a law which would prohibit the owner of property from giving away more than one-half or one-quarter of his property while he is in a normal state of mind and is not subject to undue influence. In like manner, it is contended that an Act which would exact, as a condition or as a penalty for making such gift, the payment of a tax, would likewise deprive the owner of property of one of its essential attributes without due process of law.

In *Buchanan* v. *Warley*, 245 U. S. 60, 74, Mr. Justice Day said:

> "Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property. Holden v. Hardy, 169 U. S. 366, 391. Property consists of the free use, enjoyment, and dis-

posal of a person's acquisitions without control or diminution save by the law of the land. 1 Blackstone's Com. (Cooley's Ed.), 127 (138)."

See also:

Dixon v. *People*, 168 Ill. 179, 180; 39 L. R. A. 116.

Grand Rapids Booming Co. v. *Jarvis*, 30 Mich. 308, 321.

Chicago etc. R. Co. v. *Englewood Connecting R. Co.*, 115 Ill. 375, 385.

Smith v. *Campbell*, 10 N. C. 595, 597.

Jaynes v. *Omaha St. Ry Co.*, 53 Neb. 631, 653.

Eaton v. *Boston etc. R. Co.*, 51 N. H. 504, 511.

The gifts now under consideration were not in the nature of a testamentary gift, like a gift *causa mortis*, which is only to take effect on the contingency of death and is revocable at any time prior to death (*Williams* v. *Guile*, 117 N. Y. 348; *Gardiner* v. *Parker*, 3 Madd. 102; *Edwards* v. *Jones*, 1 Myl. & Craig 226), but they were executed gifts *inter vivos*, not "amphibious," as a gift *causa mortis* was described by Mr. Justice Story to be (*Eq. Jur.*, Sec. 606), or ambulatory, incomplete, or revocable during the donor's lifetime. Likewise characteristics of a gift *causa mortis*.

The rules which apply to a gift in contemplation of death do not, therefore, obtain in respect to a gift made without such a quasi-testamentary purpose in view.

The rules which appertain to a testamentary disposition of property, or to a right of inheritance, or to a so-called estate tax, have no relation to a gift *inter vivos* not made in contemplation of death. Such a gift does not, therefore, come within the principle of *Knowlton* v. *Moore*, 178 U. S. 41, 49, 77, which related to death duties or succession taxes. The basis of such forms of taxation is now well recognized. It is only by reason of statutory enact-

ments that the property of a dead man can pass under his will or by inheritance. At common law the sovereign power had the absolute right to appropriate for its own purposes the property owned by a decedent at the time of his death. The privilege of acquiring the property of a dead man, either under his will or pursuant to the Statutes of Descents or Distribution, is merely a matter of grace.

Magoun v. *Illinois Sav. & Tr. Co.*, 170 U. S. 283.
Blackstone v. *Miller*, 188 U. S. 200, 205.

The sovereign, therefore, having theoretically the right to take all of the property of the decedent, may impose an estate or succession tax or death duty upon the transfer of such property to heirs, legatees or devisees, to the extent of any amount less than the full value of the property. Moreover, it is equally well recognized that, in case of the death of the owner of property, its title is ordinarily transferable only by means of judicial action, and the transfer of title is thus, in a legal sense, dependent upon governmental sanction.

In the case of a gift *inter vivos* this theory does not apply. The sovereign's permission, consent or authority is not required for such a gift. The right to make it is free and untrammeled. The donor is merely exercising one of his fundamental property rights. In making it he is not exercising a privilege based on any statute or ordinance, or upon governmental permission or sanction of any kind. He is not acting under any license. He is not holding his property pursuant to any grace or favor of the sovereign power. Nor is the donor in making the gift carrying on any business or occupation, under authority of government, upon which a tax can be imposed.

Further viewing such a gift from the standpoint of taxation, it is to be observed that Section 319 is in no manner based upon the theory that this tax is imposed for the

purpose of evading the estate tax imposed by the Revenue Act of 1924, or by any predecessor acts upon that theory.

By subdivisions (c) and (d) of Section 302 of the Act that contingency is fully provided for by the declaration that the value of the gross estate of the decedent shall be determined by including in the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated,

> "(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, *in contemplation of or intended to take effect in possession or enjoyment at or after his death*, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, *made by the decedent within two years prior to his death with such a consideration*, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of Part I of this title;
>
> (d) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for a fair consideration in money or money's worth."

If the gift was, therefore, made in contemplation of death, the subject matter, under the conditions specified, would be treated as a part of the estate of the decedent, and, thus, taxable. The tax upon a gift *inter vivos*

and not in contemplation of death, however, does not and, as we contend, may not come within the scope of the provisions just quoted.

In *Schlesinger* v. *Wisconsin*, 270 U. S. 230, which arose under the Inheritance Tax Law of Wisconsin, the Court had occasion to consider a provision declaring that every transfer by or grant, bargain, sale or gift made within six years prior to the death of a grantor, vendor or donor of a material part of his estate, or in the nature of a final disposition or distribution thereof, and without an adequate valuable consideration, was to be construed to have been made in contemplation of death within the meaning of the statute. The State courts had enforced this statute in the face of the due process clause of the Fourteenth Amendment. The language quoted from the opinion of the Supreme Court of Wisconsin by Mr. Justice McReynolds is significant:

> "'The tax in question is not a property tax but a tax upon the right to receive property from a decedent. It is an excise law. * * * Such [legislative] intent was to tax only gifts made in contemplation of death. That is the only class created. The legislature says that all gifts made within six years of the donor's death shall be construed to be made in contemplation of death,' [which means] 'that they shall conclusively be held to be gifts made in contemplation of death and shall fall within the one taxable class of gifts created by the legislature. * * * In our case the legislative intent we think is clear that the specified gifts were to be conclusively construed to be gifts in contemplation of death. * * * We agree with the applicants that the classification made will not support a tax as one on gifts *inter vivos* only. Under such taxation the classification is wholly arbitrary and void. We perceive no more reason why such gifts *inter vivos* should be taxed than gifts made within six years of marriage or any other event. It is because only

> one class of gifts closely connected with and a part of the inheritance tax law is created that the law becomes valid. Gifts made in contemplation of death stand in a class by themselves, and as such they are made a part of the inheritance tax law to the end that it may be effectively administered.'"

The tax imposed by Section 319 on such a gift is not payable by the donee, but by the donor and is, therefore, clearly not a succession, estate or inheritance tax or a death duty, but a tax upon the exercise of the constitutional right of the donor to give away his property. It may have constituted a part or the whole of all of his belongings. To illustrate, he may have owned property valued at exactly $100,000. He may have given it to a religious or charitable institution, or to an individual. He may not have had a penny left. He was within his constitutional right in making the gift. Could he be penalized civilly or criminally because when the tax collector should come around he would have no property with which to meet the tax imposed by this statute?

Let us further assume that in the case now before the Court the amount of the tax claimed would approximate 7 per cent. of the gift. If 7 per cent. may be thus exacted, by the same token the payment of 70 per cent. might be required. What, then, would become of the right of disposition? Who would set the limit on the amounts that may be taken?

In seeking to ascertain the basis for the right of taxation upon a gift *inter vivos* not made in contemplation of death, we come to the question as to whether this tax is authorized by the Sixteenth Amendment. That, however, merely empowers Congress "to lay and collect taxes on incomes * * * without apportionment among the several States and without regard to any census or enumeration."

But a gift is not regarded as income under any provision of the Revenue Act. On the contrary, it is expressly excluded from the definition of that term; and so far as concerns the donor, upon whom this tax is sought to be laid, it cannot by the wildest flight of fancy be regarded as income. It does not increase, but diminishes, his property.

Nor is this tax similar to a stamp tax imposed upon the transfer of shares in a corporation. The latter is a creature of government. The transfer of its shares is necessarily made with the sanction of government. Hence the imposition of a stamp duty is based upon the idea that a privilege is conferred upon the transferor.

> *People ex rel. Hatch* v. *Reardon*, 184 N. Y. 431; aff'd 204 U. S. 152.
> *Thomas* v. *United States*, 192 U. S. 363.

Certainly Congress had no power to impose this tax upon property, because that would be a direct tax within the decision in *Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S. 429, 158 U. S. 601.

Nor can it be sustained as a tax within the rule laid down in *Nicol* v. *Ames*, 173 U. S. 509, which related to a tax imposed upon the sale of property pursuant to transactions at an exchange or board of trade. There Mr. Justice Peckham, differentiating such a transaction from sales made generally, said (p. 521):

> "A tax upon the privilege of selling property at the exchange and of thus using the facilities there offered in accomplishing the sale differs radically from a tax upon every sale made in any place. The latter tax is really and practically upon property. It takes no notice of any kind of privilege or facility, and the fact of a sale is alone regarded. . . .Al

> though not created by government, this privilege or facility in effecting a sale at an exchange is so distinct and definite in its character, and constitutes so clear and plain a difference from a sale elsewhere, as to create a reasonable and substantial ground for classification and for taxation when similar sales at other places are untaxed."

It is needless to argue that such a tax as this cannot be justified by the exercise of the police power, because there is no Federal police power except to the extent conferred by the Eighteenth Amendment. The inquiry is justified as to whether or not a law which taxes the donor of food, clothing or other necessaries of life upon the amount expended for such purposes would be a valid act. If so, gifts to charity, to one's wife and children, to an educational or other philanthropic enterprise, to the community in which one lives, might likewise be made taxable. If valid, the imposition of a tax upon the donor would discourage gifts of such a character and would entail serious detriment to the public welfare. Generosity and kindliness and humane impulses would be penalized. The miser and the egoist alone would be immune.

So far as we have been able to discover there is no precedent for such a tax as that now under consideration. Despite the frequent opportunities that have arisen to strain the ingenuity of legislators to devise new forms of taxation, it has been left to this recent period in history and at a time when the clashing of warfare has ceased to impose an exaction upon the maker of a gift *inter vivos*, even though the income upon the subject of the gift is taxable while in the hands of the donee; and, if a direct tax is properly apportioned, the capital of such gift may also be taxed as against the donee. It would certainly stretch the Federal taxing power far beyond the contemplation of the framers of the Constitution to add this

burden to the ownership of property and thus to curtail the enjoyment of one of the most important attributes of ownership.

II.

The tax imposed by the Revenue Act of 1924 on gifts *inter vivos* is a direct tax and void because not apportioned as required by Article I, §2, clause 3 of the Constitution.

What has been said under Point I as to the character of this tax applies to the proposition now under consideration, and will not be repeated. It is believed that this tax, concededly "novel in this country" and without "historical background," is not an excise tax, as held by the Circuit Court of Appeals for the Second Circuit in *Anderson* v. *McVeir*, 16 Fed. (2nd) 970, but a direct tax on property, as ruled in that case by Judge Augustus N. Hand in the District Court, 10 Fed. (2nd) 813. The reasoning of the latter opinion, based on *Pollock* v. *Farmers' Loan & Trust Co.* (*supra*), *Nicol* v. *Ames* (*supra*), and *Dawson* v. *Kentucky Distilleries*, 255 U. S. 288, is regarded as more potent than that of the Circuit Court of Appeals.

It is assumed in *Blodgett* v. *Holden*, 11 Fed. (2nd) 190, that by Section 324 of the Revenue Act of 1924, which makes operative upon the tax created by Section 319 the provisions of law so far as applicable which pertain to the tax imposed by Section 301 (the estate tax), the unpaid tax becomes a lien upon the property (whether of the donor or donee is uncertain). If that were so, then the contention that the tax is a direct tax on property is strengthened.

III.

A gift made during the calendar year 1924 and prior to June 2, 1924, the date when the Revenue Act of 1924 became a law, was not made taxable by that Act; but if intended that it should be, the Act, in so far as it related to a gift so made, was void because in violation of the Fifth Amendment to the Constitution of the United States.

By Section 319 it is provided that "for the calendar year 1924 and each calendar year thereafter, a tax equal to the sum of the following is hereby imposed upon the transfer by a resident by gift during such calendar year of any property wherever situated, whether made directly or indirectly."

There is nothing in this language which expressly declares that a gift made prior to June 2, 1924, is intended to be taxed. It is not provided that the tax is imposed on *all* gifts made during the calendar year. The language adopted is fully satisfied when applied to gifts made during the calendar year subsequent to the date of the passage of the Act. If the purpose of the legislators had been otherwise, they would have referred to the gift as one made either before or after the passage of the Act. The failure to do so gives rise to the presumption that the legislation was intended to be prospective, and not retrospective, in its operation. This is especially true of a law imposing taxation, in regard to which it has been frequently declared that such an Act is not to be extended by implication, and that any doubt as to its operation is to be resolved in favor of the taxpayer.

In *Shwab* v. *Doyle*, 258 U. S. 529, the Court was called upon to determine as to the retroactivity of the Revenue

Act of 1916, which imposed a tax upon the transfer of the net estate of every decedent dying after its passage, "to the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has consummated a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death." It was held that the Act was not intended to apply to transactions consummated before its passage, and this ruling was made notwithstanding the fact that the statute further declared that "any transfer of a material part of his property in the nature of a final disposition or distribution thereof made by the decedent *within two years prior to his death* with such a consideration [referring to a fair consideration in money or money's worth], shall, unless shown to the contrary, be deemed to have been made in contemplation of death." It was further held that the re-enactment of this provision, with the added provision that the transfer or trust should be taxed whether made before or after the passage of the Act, was not a construction of the earlier Act as being retroactive, but was the expression of a new purpose.

In the opinion delivered by Mr. Justice McKenna we read (pp. 534-535):

> "The initial admonition is that laws are not to be considered as applying to cases which arose before their passage unless that intention be clearly declared. 1 Kent, 455; Eidman v. Martinez, 184 U. S. 545; Gould v. Gould, 245 U. S. 151; Story, Const., § 1398. The comment of Story is, 'retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact.' There is absolute prohibition against them when their purpose is punitive; they being then denominated *ex post facto* laws. It is the sense of the situation that that which impels prohibition

> in such case exacts clearness of declaration when burdens are imposed upon completed and remote transactions, or consequences given to them of which there could have been no foresight or contemplation when they were designed and consummated. The Act of September 8, 1916, is within the condemnation. There is certainly in it no declaration of retroactivity, 'clear, strong and imperative,' which is the condition expressed in United States v. Heth, 3 Cranch, 398, 413; also United States v. Burr, 159 U. S. 78, 82 83. If the absence of such determining declaration gives to the statute a double sense, it is the command of the cases that that which rejects retroactive operation must be selected."

See also:

> *Union Trust Co.* v. *Wardell*, 258 U. S. 537.
> *Levy* v. *Wardell*, 258 U. S. 542.
> *Knox* v. *McElligott*, 258 U. S. 546.

Similar in principle are *United States* v. *Field*, 255 U. S. 257, and *Smietanka* v. *First Trust & Savings Bank*, 257 U. S. 602.

Were this Act, however, to be interpreted as retrospective in its operation, it would be of so arbitrary a character as to offend against the Fifth Amendment to the Constitution of the United States.

This is believed to be the effect of the ruling in *Nichols* v. *Coolidge*, 47 Sup. Ct. Rep. 710, decided May 31, 1927. There it was held that Section 402c of the Revenue Act of 1918, if construed as requiring a tax on the value of property transferred by decedent prior to its passage in entire good faith and without contemplation of death, merely because the conveyance was intended to take effect in possession at or after death, was so arbitrary as to amount to

confiscation, and thus contrary to the protection afforded by the Fifth Amendment. Mr. Justice McReynolds said:

> "Under the theory advanced for the United States, the arbitrary, whimsical and burdensome character of the challenged tax is plain enough. An excise is prescribed, but the amount of it is made to depend upon past lawful transactions, not testamentary in character and beyond recall."

Lewellyn v. Frick, 268 U. S. 238, arose under the Revenue Act of February 24, 1919, which purported to include policies insuring the life of a decedent in the gross value of his estate as a basis for fixing the transfer tax thereon, though the policies be payable to beneficiaries other than the estate, and which allowed the executor to recover from such beneficiaries their proportions of such tax and make them personally responsible therefor if not paid when due. This provision was construed as inapplicable to transactions antedating the passage of the Act. While the Court refrained from discussing the limits of the power of Congress in such case, Mr. Justice Holmes said:

> "Acts of Congress are to be construed if possible in such a way as to avoid grave doubts of this kind. Panama R. R. Co. v. Johnson, 264 U. S. 375, 390. Not only are such doubts avoided by construing the statute as referring only to transactions taking place after it was passed, but the general principle that the laws are not to be considered as applying to cases which arose before their passage is preserved, when to disregard it would be to impose an unexpected liability that if known might have induced those concerned to avoid it and to use their money in other ways."

It was also held that a declaration in a subsequent Act dealing with the same subject, that a provision contained in it shall be retroactive, helps the conclusion that the

same provision in an earlier Act lacking such declaration was not retroactive.

It may be added that according to this persuasive process of reasoning the same result would follow from the fact that, prior to the passage of the Act now under consideration, Congress had in the Revenue Act expressly declared a purpose to make other cognate provisions applicable to transactions completed before such enactment. This is especially important when one considers that in the Act now under review, Congress, with presumptive knowledge of these statutory precedents, and of the decisions above cited, had deliberately refrained from making a similar declaration of intention.

In the cases now before the Court, the gifts sought to be taxed had been executed prior to the passage of the Revenue Act of 1924. They were not gifts *causa mortis*, but *inter vivos*. There is no pretense that they in any way were made in contemplation of death or for the purpose of evading the provisions of law taxing inheritances. The gifts were in every way lawful and made in the exercise of a constitutional right. The fact that they were consummated but a short time prior to the passage of the law does not affect the constitutional question, there being no claim of bad faith. The situation is, therefore, the same as it would have been had the gifts been made one, five, or ten years prior to this enactment. The fact that the rate of the tax is comparatively small as affecting most donors does not subject it to any different rule than would obtain if it were attempted by a law passed in 1927 to tax at the rate of 50 per cent every gift *inter vivos* made in ordinary course since the beginning of the century.

Respectfully submitted,

LOUIS MARSHALL,
of Counsel for Fannie E. Untermyer and Edward D. Untermyer, Executors, Amici Curiae.